SINNATAMBY SEAHOMES SDN BHD

v.

PERWIRA HABIB BANK MALAYSIA BHD

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 23-421-86]
7 MARCH 2001

BANKING: *Banker and customer - Negligence - Company resolution or mandate - Duty of bank to observe - Whether bank negligent in issuing demand draft to third party - Whether draft issued in accordance with company's mandate - Right of surety/chargor to sue bank - Scope of bank's duty of care*

The plaintiff charged its land to the defendant as security for credit facilities granted by the defendant to a company ('TE'). It was not disputed that according to TE's resolution ('the resolution') the plaintiff was the sole compulsory signatory of TE's bank accounts and that so long as the charge existed, no amendment to the operation of TE's accounts shall be made without the consent of the plaintiff.

Subsequently, upon TE's request through a letter ('the letter') issued by TE but not signed by the plaintiff, the defendant issued a demand draft in favour of a third party and debited TE's account without the plaintiff's instruction or authorisation. The plaintiff paid the sum due on the draft under protest when it redeemed its land and took an action against the defendant for the payment of the said sum plus interest based on negligence or breach of mandate.

The issues that arose for decision were: (a) whether the defendant had breached the mandate; (b) whether TE's letter had amended or varied the mandate; (c) whether by its acceptance of the draft, TE had rectified the breach of the mandate; and (d) if the mandate was breached, whether the plaintiff had a cause of action against the defendant.

The defendant's main contention was that there was no privity of contract between the plaintiff and the defendant.

Held:

[1] To say that only a banker and borrower can sue each other is devoid of merits. A surety has a right to sue if there is a breach of the conditions.

[2] There was indeed privity of contract between the plaintiff and defendant, one being the chargor and the other the chargee of the same land who owed duties and obligations to each other.

[3] A resolution is a formal documentation of action taken by a board of directors or general body. The letter signed by only one director (without the plaintiff) was not a resolution. This however did not necessarily mean that TE was not bound by the instructions in the letter. The key issue here was whether the defendant could act on the instructions of the letter to issue the draft to the third party.

[4] A banker who has negligently issued a banker's draft without authority signed in accordance with the company's mandate is liable for the loss. As the mode of drawdown here was changed without the all important authority of the persons authorised to speak and act for TE, there was clearly a failure on the part of the defendant to abide by the mandate prescribed by the resolution.

[5] It was not true that the duty of the defendant was solely within the four corners of the charge, especially when the circumstances surrounding the creation of the charge specifically imposed on the defendant a duty of care.

[6] The liability on the draft was incurred because of a lapse or a breach of duty and the plaintiff chargor suffered loss as a direct consequence of the lapse or breach of duty owed to it by the defendant chargee.

[Judgment for plaintiff.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Bank Bumiputra Malaysia Bhd v. Galian Saham Sdn Bhd [1990] 1 CLJ 58 ***(refd)***

Bank of Montreal v. Dominion Gresham Guarantee & Casulty Co [1930] AC 659 ***(refd)***

Catlin v. Cyprus Finance Corp (London) Ltd (Catlin, 3rd Party) [1983] All ER 809 ***(refd)***

Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd [1997] 4 CLJ 170 ***(refd)***

Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors [1980] 1 All ER 928 ***(refd)***

In re Duomatic Ltd [1969] 2 Ch D 365 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1986] 1 MLJ 44 ***(refd)***
Perumal v. PP [1970] 2 MLJ 265 ***(refd)***
Royal British Bank v. Turquand [1855] 5 E & B 248 ***(refd)***
Southern Bank Bhd v. Halidah Ab Rahman [1987] 1 CLJ 65 ***(refd)***
Standard Chartered Bank v. Johnny Walker [1982] 1 WLR 1410 ***(refd)***
Standard Chartered Bank v. Konwah Enterprise Sdn Bhd & Ors [1989] 2 CLJ 488 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 86
Courts of Judicature Act 1964, s. 16(i)
Rules of the High Court 1980, O. 42 r. 12

Bill of Exchange Act 1949 [UK], s. 25
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3(1)

Other source(s) referred to:
Corporate Powers – Controls, Remedies and Decision-making, Loh Siew Cheang, p 504
Halsbury's Law of England, 4th edn, vol 3, paras 51, 61, vol 1, para 10.9-024
Law of Banking, Poh Chu Chai, 3rd edn, vol 1, p 530
Paget's Law of Banking, 10th edn, p 202, 11th edn, p 186
Pennington's Company Law, 7th edn, p 137
Sheldon and Fidler's Practice and Law of Banking, 11th edn, pp 120, 244

For the plaintiff - V Sithambaram (P Navaratnam with him); M/s Kumar, Sitham & Co
For the defendant - Quah Boon Lee; M/s JB Lim & Assoc

Reported by Yow Ting Fong

JUDGMENT

Jeffrey Tan J:

This is the plaintiff's action for a declaration that the defendant had wrongly debited RM199,000 from the account of one Tulin Enterprise Sdn. Bhd. (TE), and, for an order that the defendant do pay to the plaintiff the sum of RM362,952.56 (being RM199,000 plus interest thereon allegedly amounting to RM169,952.56, both paid by the plaintiff to the defendant) together with pre-judgment and post-judgment interest, and costs.

Apparently, the plaintiff had charged its land (Lot 199, Mukim 17, North East District, Penang – hereinafter referred to as the land) to the defendant, on 26 June 1982, as security for credit facilities (totalling RM3,710,000) granted by the defendant to TE, and the plaintiff paid RM1,327,917.72 to the defendant

to redeem its land, when TE defaulted on the loan. It is the plaintiff's case, that the redemption sum would have been lower, by RM362,952.56, if RM199,000 was not wrongly debited.

Mr P Navaratnam for the plaintiff, in his short opening statement, thus put the case of the plaintiff. By resolution dated 24 May 1982, TE appointed Sinnathamby Nadarajah as the sole 'compulsory signatory' of its banking accounts. That resolution was handed to the defendant. By letter dated 15 June 1982, TE notified the defendant "that so long as the charge on the land exists, no amendment to the operation of TE's account shall he made without the prior written consent of Sinnathamby Nadarajah". On 26 June 1982, the plaintiff charged the land to the defendant. On 8 October 1982, upon TE's request, the defendant issued a demand draft (draft) for RM199,000 in favour of one Benquen (M) Sdn. Bhd. and debited TE's account. Sinnathamby Nadarajah had not instructed nor authorised that draft. The plaintiff paid the sum due on that draft, under protest, when it redeemed its land.

Mr Quah Boon Lee for the defendant, in his equally short opening statement, said that the defendant is not disputing the resolution and letter dated 15 June 1982, and not disputing that the resolution was brought to the attention of the defendant. However, he said that the defence is that the defendant was carrying out the instructions of TE, its customer, whereas there was no privity of contract between plaintiff and defendant.

Both learned counsel also said that encl. 29 is an agreed bundle of documents (AB) – agreed as to the content and dispensation of formal proof. In the result, the only disputed document is the agreement dated 7 June 1982 (DB) made between the plaintiff and TE.

Sinnathamby Nadarajah (PW1), the only witness summoned by the plaintiff, testified as follows. He is a retired teacher and a director of the plaintiff. Ooi Thean Chuan (Ooi), a director of TE, was his close friend. Sometime in 1982, Ooi approached him for help. Ooi was having financial difficulties. Ooi asked him to charge the land to a bank to raise funds. Ooi later told him that that bank was the defendant. He agreed to charge the land to the defendant, provided he would be a compulsory signatory of TE's banking account. On 14 May 1982, TE passed the resolution in AB16-17.

He personally handed that resolution to Mr Boey, the manager of the defendant. Mr Chuah, whom he believed was the Assistant Manager, acknowledged receipt of that resolution. Mr Boey asked if he was a partner of TE. He replied he was just a friend. He told Mr Chuah he would be a compulsory signatory. On 15 April 1982, TE instructed the defendant that so

long as the land was charged to the defendant there could not be any change to the signatories of TE's account. He personally handed to that letter dated 15 April 1982 (AB1) to Mr Boey.

On 18 June 1982, he executed a charge (P1) of the land in favour of the defendant. He signed a few cheques for TE. Sometime in October 1982, at TE's office, he chanced upon the letter dated 10 September 1982 and requesting for a demand draft (AB2). Before then, he knew nothing of AB2. He had not signed AB2. When he got to know of AB2, he telephoned the defendant. Mr Boey was not in, but the officer who received his call recorded what he said. He told that officer that the draft should not be issued, as it did not have his authority. He believed that the draft had not been issued at that time. He assumed, after his telephone call to the defendant, that the draft would not be issued. He found that the defendant had just ignored him and issued the draft. He had not signed any cheque towards payment of the draft of RM199,000. AB3 and AB4 show that the draft was issued in favour of Benquen. AB5 was written by Messrs Lee Kok Liang & Co. on his instructions. AB7 was the reply he received. AB9 was his reply to AB7. Later, by AB10, he complained to the defendant's headquarters. To his complaint, he received no reply. Sometime in 1986, *via* AB12, he requested for a redemption statement. He paid the full redemption sum demanded in AB13. Of the total redemption sum, he disputed the sum of RM199,000. He borrowed, from Raayat 1st Merchant Bank of Kuala Lumpur, at 18.7% interest p.a., to settle the redemption sum. TE closed down in 1983. "Ooi just disappeared." He could not locate Ooi. He sold the land in 1990.

Cross-examined, PW1 testified that the plaintiff was incorporated to hold the land, as he was advised that that would be more beneficial in view of his single status. The land was a valuable piece of land. He charged the land to help Ooi operate his crocodile farm. It was charged because Ooi was a friend. The plaintiff received no benefit. It was just a good deed to a friend. He was aware that the land could be foreclosed if TE defaulted on the loan. But it did not appear to him at that time that such a situation would arise. He was not involved in the business affairs of TE. Now and again, he only checked if the interest on the loan was paid. He had not signed any cheque for RM199,000 in favour of Benquen. After he saw that letter AB2, he saw Ooi. He assumed that the defendant would not act on AB2. PW1 was not re-examined.

Likewise, the defendant also only summoned one witness, Lee Beng Hin (DW1), who testified as follows. He is the head of credit of the defendant's branch. In 1982, he was a clerk in the defendant's branch. On 15 May 1982, the defendant granted to TE, an overdraft facility of RM1,000,000, a term loan of RM1,710,000, and letters of credit and trust receipt facility of RM1,000,000.

Those facilities were secured by a 1st charge of the land, by debentures created by TE, and by the joint and several guarantees of TE's directors. Pursuant to TE's request, *via* AB2, a draft for RM199,000 was issued in favour of Benquen. The defendant has the resolution AB16-17. PW1 had not signed AB2. "Basically, the defendant issued the draft on the instructions in AB2."

Asked if it was the normal practice of the defendant to follow instructions in letters, DW1 testified that it is the normal procedure to follow the instructions of the customer. Asked why the defendant had issued the draft, despite the fact that PW1 had not signed AB2, DW1 said there is the following note in the file relating to the said loans:

> Signature verified by Cik Noriza. Party rang up quite a few times to enquire if drawdowns in order. Please confirm. KGB please prepare demand draft favouring Benquen (M) Sdn. Bhd. and debit party's account for RM199,000, Chan Kok Keng 29.9.82.

DW1 testified as well that AB2 was received as an amendment to the resolution.

Cross-examined, DW1 agreed that banks must operate according to mandates. Asked if one director without PW1 could request for a draft, DW1 answered:

> It will be up to the manager's discretion, because he knows the general affairs of the account. The letter of offer stipulated allowance for drawdowns on the overdraft account towards purchase of crocodiles. Then at times we had to dishonour cheques even signed by PW1 because they did not meet the conditions of drawdown.

Then ensued the following questions and answers:

> Q: do you agree that the instructions on the note you read were wrong?
>
> A: I am unable to say whether it was right or wrong.
>
> Q: You say the manager had a discretion, are you saying that the manager had a discretion to ignore the mandate?
>
> A: The manager had no discretion to ignore the mandate

DW1 confirmed that the plaintiff paid the interest charged on the said RM199,000. Re-examined, DW1 answered that normally telephone conversations would be recorded on the file, but there is no record of any telephone conversation relating to the instant account on the file.

Mr Quah submitted that the plaintiff's case is based on negligence or breach of mandate. Three issues pertinent to that mandate, he said, had been raised: (i) whether the defendant had breached the mandate (AB16-17), (ii) whether

TE, by its letter AB2 dated 10 September 1982 (AB2) had amended or varied the mandate, (iii) whether TE by its acceptance of the draft had rectified whatever breach of the original mandate, and, (iv) if the defendant had breached the original mandate, whether the plaintiff had a cause of action against the defendant.

Mr Quah further submitted that all instructions pertaining to the operation of an overdraft account are mandates. The defendant relied on AB2, the instruction to debit the account. That was the clear mandate to the defendant, and that mandate was not challenged by TE. PW1 had not signed AB2, as PW1 was not a director of TE. AB4 was the letter by the directors of TE confirming the receipt of the draft. All directors of TE agreed to the issuance of the draft. Even if there was a breach, it was rectified by TE. He further submitted, referring to the *Law of Banking* 3rd edn vol 1 by Poh Chu Chai @ 530, that an unauthorised act may be subsequently rectified. AB1 was also an instruction not signed by PW1. It is not just by resolution that a customer could give instructions. The draft benefited TE, and TE could have no action against the defendant. Changing mandates is common practice amongst customers. To say that mandates could never be amended or changed is not valid. An instruction may be oral. AB16-17 could not inhibit future mandates of TE to the defendant. Any action for breach of contract must be between the plaintiff and TE. The plaintiff had no *locus standi* to commence this action. The plaintiff was a mere chargor. The contractual relationship between TE and the defendant was confined to the four corners of the charge instrument. The charge instrument did not provide for the observance of the mandate. It was not pleaded that the mandate had been breached. The plaintiff was obliged to pay to the defendant the amount owing on the loans. The plaintiff had not proved its case. The defendant did not owe a duty of care to the plaintiff. The defendant owed that duty only to TE. Only TE could give mandates, and the defendant had to follow TE's instructions. It was pleaded that the plaintiff had suffered losses. But no relief was pleaded for the alleged negligence. The damage consequent to the alleged negligence was also not pleaded. The plaintiff did nothing despite knowing that the mandate was varied. That was negligence on the part of the plaintiff. A declaration is not suitable relief. There is no evidence that RM362,952.56 was owing by the defendant, no evidence of the interest demanded by the plaintiff or how that interest was computed. The plaintiff claims 14% interest, but there is no evidence that that was the interest that was suffered. 8% interest is the norm.

Mr V. Sithambaram, lead counsel for the plaintiff, submitted as follows. The plaintiff's case is based on AB1-17, and P1. All those documents are not in dispute, save for the interpretation. There was a breach of contract, in that there was a breach of the authorised signatories communicated by both the

plaintiff and TE to the defendant. There is admission that the mandate was breached and that authority must come from the authorised signatories. The defence is privity of contract. P1 enacted the privity and created a relationship of banker and surety. So long as there were AB1, P1, and resolution, there was a contractual relationship that entitled the plaintiff to the present cause of action. The resolution was followed by AB1 and then P1. The resolution contained the conditions precedent to the charge. The breach entitled the plaintiff to actual loss and damages in the form of interest. AB13 is the proof of the redemption sum. The plaintiff testified that he charged the land to Raayat 1st Merchant Bank of Kuala Lumpur to redeem the said land. The defendant is liable, because it failed to comply with its contractual obligations under AB16-17, AB1 and P1, for the actual loss suffered by the plaintiff, ie, RM199,000 together with interest thereon at 14% p.a. to 1 January 1990 and interest thereafter at 8% p.a. The plaintiff is entitled to the interest paid to Raayat 1st Merchant Bank of Kuala Lumpur. Section 86 of the Contract Act 1950 is relevant. There was a variation of the conditions precedent. P1 gave the plaintiff an immediate right of action directly against the defendant in the event of any breach of the conditions precedent. To say that only a banker and borrower can sue each other is devoid of merit. A surety has a right to sue if there is a breach of the conditions. The case of *Catlin v. Cyprus Finance Corp (London) Ltd (Catlin, 3rd Party)* [1983] All ER 809 illustrates the duty owed to several account holders: whenever there was a breach of that duty due to negligence, the party who did not give the authority is entitled to full reimbursement. So long as the land was charged, the account could not be operated without PW1' consent or approval. AB16-17 was a company resolution, and AB2 could not vary that resolution. AB2 could not change the agreed signatories nor authorised that draft for RM199,000. Rectification was not pleaded as a defence. There is jurisdiction to award interest as a general damage. 8% compound interest may be granted. The case of *Bank of Montreal v. Dominion Gresham Guarantee & Casulty Co.* [1930] AC 659 illustrates the bank's liability for an irregularly issued draft. Mr Sithambalam further submitted that there was a failure to challenge the evidence of the plaintiff.

Mr Quah replied that s. 11 of the Civil Law Act 1956 does not permit compound interest, that there is no evidence that interest was paid after the land was redeemed, that the plaintiff's claim is something out of the ordinary, and, that the claim for interest on the sum borrowed is not foreseeable.

So much for the submissions. But about the pleadings? Is it true, that the alleged breach of the mandate, or damage/relief for the alleged negligence were not pleaded?

Prior to the trial, the statement of claim was amended and re-amended. An examination of the original statement of claim reveals that the plaintiff pleaded, in paras 3-10, that by an agreement dated 7 June 1982 the plaintiff agreed to charge the land to the defendant as security for loan facilities totalling RM3,710,000 to be granted by the defendant to TE (see para 3), that the agreement stipulated that PW1 shall be a compulsory signatory to all TE's banking accounts at the defendant bank, and, that TE shall pass all resolutions to implement the term that PW1 shall be such a compulsory signatory (see paras 4 & 5), that TE appointed PW1, by resolution dated 24 May 1982, as a 'compulsory signatory' of its banking accounts (see para 6), that a copy of the resolution was delivered to the defendant (see para 7), that TE informed the defendant, by letter dated 15 June 1982, that so long as the land remained charged there shall be no amendments to the operation of account No. 1666 without the prior written consent of PW1 (see para 8), that in consideration of the loan facilities to be granted to TE, the plaintiff charged the land to the defendant (see para 9), that the defendant on 8 October 1982 issued a draft for RM199,000 in favour of Benquen (see para 10), and, that PW1 had not authorised the issuance of that draft (see para 11). Those pleadings were not touched by the amendments.

In the amended and re-amended statement of claim, the plaintiff pleaded, that unbeknown to the plaintiff, TE requested the defendant, by letter dated 10 September 1982, to issue a draft for RM199,000 in favour of Benquen, and that the defendant issued that draft and debited TE's account (see para 11A), that the matters complained constituted a variation of the terms of contract between TE and defendant without the consent of the plaintiff, and that that variation thereby discharged the plaintiff from all liability in respect of the said RM199,000 and all interest thereon (see para 11B), and, that the defendant negligently issued the draft and debited TE's account (see para 11C). The particulars of negligence further stated that the defendant, (i) failed to ensure that the mandate was adhered to, (ii) issued and delivered the draft, debited TE's account, even though it knew that PW1 had not authorised the draft, that it was contrary to the mandate, and that AB2 was not signed by PW1, (iii) failed to ensure that its own procedure on the issuance of drafts was adhered to, and, (iv) issued the draft and debited TE's account even though there was no payment by way of a cheque drawn on TE's account and signed by PW1 and one other signatory. In the following para 13, the plaintiff pleaded that TE defaulted on the loan and that on 14 July 1986 the plaintiff paid RM1,327,917.72 to the defendant. As related earlier, with regard to the reliefs, the plaintiff asked for a declaration that the defendant wrongly debited RM199,000 from TE's account, and, for an order that the defendant do pay the plaintiff the sum of RM362,952.56 (being RM199,000 plus interest thereon

amounting to RM169,952.56) together with pre-judgment and post-judgment interest thereon from 14 July 1986. Given that state of the pleadings, it is patently clear, that it was pleaded that the defendant issued the draft without the instruction or authority of the 'compulsory signatory', as well as was pleaded as the relief, a refund of that RM362,952.56 together with interest. Clearly, there is no case for complaint that the alleged breach of the mandate and the relief for the alleged negligence were not pleaded.

But it has not gone unnoticed, that any question of any possible estoppel or any question of AB1 being a condition precedent to the creation of the charge were not specifically pleaded. The re-amended statement of claim does not show that the plaintiff is relying upon those questions. Without notice to the opposite side, those questions, as such, could not be considered.

Pleaded extensively though were facts, matters and circumstances related to the alleged variation of the terms of agreement between TE and defendant without the consent of the plaintiff, and the averment that the alleged variation thereby discharged the plaintiff from all liability in respect of the said RM199,000 and all interest thereon. Mr Sithambaram specifically referred to s. 86 of the Contract Act 1950. But the plaintiff was no guarantor. "... it is wrong to conclude that the principles of law that govern guarantees apply with equal force to charges" (*Co-operative Central Bank Limited, The v. Y & W Development Sdn Bhd* [1997] 4 CLJ 170, per Gopal Sri Ram JCA). "It is akin to a secured guarantee, but with important differences. See *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36; *NKM Properties Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd* [1986] 1 MLJ 44" (*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, 109, per Gopal Sri Ram JCA). Plainly, Part VIII of the Contract Act 1950 has no application in this case.

On the matter of proof, of those allegations in the re-amended statement of claim, the defendant unquestionably admitted, first in its re-amended defence (see paras 3 and 4) and then again in the opening statement of counsel, its receipt of the resolution dated 24 May 1982 and the letter dated 15 June 1982. The defendant also admitted, that the land was charged as security for the loans granted to TE (see para 6 of the re-amended defence), and, that the defendant issued, on 8 October 1982 and at the request of TE, a draft for RM199,000 in favour of Benquen, and then debited that sum from TE's account (see paras 7 and 8A of the re-amended defence). The defendant also admitted the contents of the resolution (AB16-17) and letters (AB1 and AB2), which are now reproduced below.

AB16-17

Tulin Enterprises Sdn. Bhd.

Extract from circular resolution passed by the directors for the time being of Tulin Enterprise Sdn. Bhd. pursuant to Article 131 of the Company's Articles of Association, this 24th day of May 1982.

Resolved:-

CHANGE OF AUTHORISED SIGNATORIES

That the previous resolution dated 27th November 1981 pertaining to the operation of a current account No. 1666 with Perwira Habib Bank Malaysia Berhad, 4521, Jalan Bagan Luar, Butterworth, be and is hereby amended by way of deleting in its entirety the authorised signatories to the said account and with immediate effect, the said Bank be and is hereby authorised to honour all cheques, bills of exchange, promissory notes, etc., signed solely by NADARAJAH S/O SINNATAMBY together with any one of the following two directors:-

AHMAD BIN KECHIK

OOI THEAN CHUAN

And that any of the above named signatories be and is hereby authorised to endorse on behalf of the Company all cheques, bills of exchange, promissory notes, etc., lodged for collection to the credit of the Company's account;

BANKING FACILITIES

That the Company do hereby negotiate with and accept the following banking facilities amounting to $3,710,000.00 (Ringgit Three million seven hundred and ten thousand only) from Perwira Habib Bank Malaysia Berhad, Malaysia 4521, Jalan Bagan Luar, Butterworth, within (PHB) subject to the terms and conditions as stated in PHB's letter of approval dated 15.5.1982:-

Fixed loan	$1,710,000.00
Overdraft	1,000,000.00
Letters of Credit with sub-limit of Trust Receipts of $700,000.00	1,000,000.00
Total	$3,710,000.00

a	FIRST FIXED CHARGE FROM SINNATAMBY	That as part of the securities against the above mentioned facilities granted by PHB, the Company do hereby approve and accept the creation of a first fixed charge of $3,710,000.00 (Ringgit Three million seven hundred and ten thousand only), by Messrs Sinnatamby Seahomes Sdn. Bhd., (Sinnatamby) over 10.462 acres of housing land held under Lot No. 199, Mukim 17, N.E. District, Penang in favour of PHB;
b		
	FIRST FIXED & FLOATING CHARGE	That the Company do execute a first fixed and floating charge over all those assets of the Company as listed in Schedule A attached herewith for identification purpose.
c		
	JOINT & SEVERAL GUARANTEE	That all the directors for the time being of the Company be and are hereby authorised to sign a joint and several guarantee for the above banking facilities, in favour of PHB:
d	USE OF SEAL	And that authority he and is hereby given for the Common Seal of the Company to be affixed to the relevant deeds/ documents required to effect the above transactions thereat, in accordance with the Company's Articles of Association.

Certified True Copy
(signature illegible)
Secretary

e

We hereby acknowledge receipt of this letter

Cop of Perwira Habib Bank Bhd. Butterworth

f

AB1

Tulin Enterprises Sdn. Bhd.

15th June 1982.

g

The Manager,
Perwira Habib Bank,
Butterworth.

Dear Sir,

h

This is to notify you that so long as the charge on Lot 199, Mukim 17, N.E.D. Penang exists, no amendment to the operation of the current account No. 1666 with Perwira Habib Bank (M) Bhd. Butterworth, shall be made without the prior written consent from Mr. Sinnatamby Nadarajah (I.C. 2194222) of Sinnatamby Seahomes Sdn. Bhd.

i

Please acknowledge receipt of this letter by signing the duplicate attached.

Your faithfully,

Tulin Enterprise Sdn. Bhd.
Signature illegible

We hereby acknowledge receipt of this letter

Cop of Perwira Habib Bank

Signature illegible

c.c.
Sinnatamby Nadarajah

AB2

Tulin Enterprises Sdn. Bhd.

The Manager,
Perwira Habib Bank Malaysia Bhd.,
4521, Jalan Bagan Luar,
Butterworth,
P.W.

10th September 1982.

Mode of Drawdown from Overdraft Account

The arrangement has been for your bank to honour all cheques on our A/C 1666 with you when accompanied by the relevant invoices and delivery orders in support of our purchase of crocodiles from our supplier Messrs Benquin M'sia Sdn. Bhd. This arrangement has led to a number of cheques being returned when our directors were away overseas and the Bank was not able to confirm our drawings as documents in support of the drawings arrived in a separate cover and much later. To avoid having to return those cheques and with immediate effect, the Bank is hereby authorised to debit our OD/AC 1666 and issue bank drafts to our supplier Messrs Benquin M'sia Sdn. Bhd., in consideration for which we hereby undertake to forward the relevant documents in support of our purchase of crocodiles from Mess Benquin Malaysia Sdn. Bhd.

We understand and fully accept that the overdraft of $1million is only to meet our purchase of crocodiles. Cheques are issued payable to 3rd parties but these in actual fact are reimbursements to cover advance payments for the purchase of crocodiles and constitute part of the purchase price. You have the discretion to dishonour such cheques of the drawings are not shown on the invoices issued by M/S Benquin M'sia Sdn. Bhd., to be part of the purchase price. We trust this arrangement will help clarify matters.

Thank you.

Yours faithfully,

Tulin Enterprise Sdn. Bhd.
Signature illegible

Then, on admissions alone, it stacks up, (1) that TE notified the defendant even before the land was charged, that as long as the land was charged, no changes shall be made to the operation of TE's banking accounts without the prior written consent of PW1, (ii) that the defendant received that notification, (iii) that TE by resolution appointed PW1 as the sole 'compulsory signatory' of its banking accounts, (iv) that the defendant received that resolution, (v) that thereafter the plaintiff charged the land to the defendant as security for loans to be granted by the defendant to TE, (vi) that the defendant issued the draft, not on the instructions or authority of PW1, but at the request of TE. The rest of the story, so PW1 who was not challenged testified, was that TE defaulted on the loan, "Ooi disappeared", and on 14 July 1986 the plaintiff paid the defendant the sum of RM1,327,917.72 to redeem its land.

It was contended that the defendant was following the instructions of TE, its customer, and that the defendant owed no duty to the plaintiff, as there was no privity of contract between the plaintiff and defendant. But there was, with respect, privity of contract between plaintiff and defendant. One was chargor while the other was chargee of the same said land, who owed duties and obligations to the other. The only question is whether the defendant owed the plaintiff a duty to abide by the resolution dated 24 May 1982 and letter dated 15 June 1982.

In the context of a corporate, a resolution is a formal documentation of action taken by the board of directors or general body. In the present case, the circular resolution dated 15 June 1982 was the formal documentation of action taken by TE's board of directors, of an action to which TE was bound. However, that letter dated 10 September 1982 was no resolution; it was a letter, from a single director, albeit with instructions to the defendant. There is no evidence of any meeting held nor resolution passed to authorise those instructions. Nevertheless, even if there was neither a meeting held nor resolution passed to authorise those instructions, TE was not necessarily not bound by those instructions in the letter dated 10 September 1982. Under the rule in the case of *Royal British Bank v. Turquand* [1855] 5 E & B 248, "if a person deals in good faith with the board of directors or other representative body of a company which is in fact exercising powers of management and direction of its business and affairs, that person is not affected by defects of procedure within the company or by its failure to fulfil conditions which are

required by the company's memorandum or articles to be fulfilled before the act or transaction in question is effected" (*Pennington's Company Law* 7th edn p 137). "The rule in *Royal British Bank v. Turquand* is designed to protect persons dealing with the company, not to protect the company itself ..." (*Pennington's ibid* p 138). Further, under the principle of unanimous consent commonly referred to as the 'Duomatic rule' after the case of *In re Duomatic Ltd* [1969] 2 Ch D 365, that is, if all directors or shareholders agree to a particular course of conduct or transaction which is honest and *intra vires* the company, the matter done will be upheld, notwithstanding the fact that the matter was not done in the required form (see *Corporate Powers – Controls, Remedies and Decision-making* by Loh Siew Cheang p 504). Anyway, it is not necessary to say whether that rule or principle are applicable or inapplicable in this case, as it is not in issue. The key issue, as it would appear, is whether the defendant could act on the instructions to issue the draft to Benquen.

TE was a borrower. Still, the relationship between the defendant and TE was one of banker and customer. A paying banker's obligation is to honour his customer's payment instructions. "A paying banker owes his customer a contractual duty of care in carrying out payment instructions" (*Paget's Laws of Banking* 10th edn p 202). A paying banker must act with reasonable care. The payment instruction "must be drawn by a person having authority express or implied" (*Halsbury's Law of England* 4th edn vol 3 para 51). "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent is so signing was acting within the actual limits of his authority" (Bill of Exchange Act 1949 s. 25). "A per pro signature puts the banker on inquiry as to the person so signing. Where the account is not that of an individual, it is customary to take a mandate setting out the parties authorised to draw and the form in which they shall sign; the mandate must be strictly observed" (*Halsbury's ibid* para 51). "... the question or who is authorised to draw cheques on the company's account will be determined by the terms of the mandate which must be faithfully observed. The mandate may authorise designated officials to sign cheques, in which case, where changes are made in the relevant appointments, the banker should obtain satisfactory evidence of the change in the appointment ... In all cases, the banker should obtain specimen signatures" (*Sheldon and Fidler's Practice and Law of Banking* 11th edn p 120). "Subject to questions of statutory protection, estoppel, or adoption, a banker who has paid a cheque drawn without authority or has paid one in contravention of his customer's order, or probably, negligently, cannot debit the customer's account with the amount" (*Halsbury's ibid* para 61). "When a customer's mandate to a bank requires cheques drawn on the customer's

account to be signed by two or more signatories, the paying bank will be acting in breach of mandate if it makes payment on a cheque bearing less than the required signatures. An agent who issues a cheque on the principal's account using his own signature when two signatures are required is acting in breach of his authority. A bank which makes payment on the cheque will be doing so without the customer's mandate and has no right to debit the customer's account. An unauthorised act by an agent can, however, be rectified by the principal acting with full knowledge of the unauthorised act" (*Law of Banking* 3rd edn Vol 1 by Poh Chu Chai at p 530).

The same considerations apply to a bankers draft. "The customer requiring the draft should complete and sign an application form, stating the amount of the draft required, the name of the payee and the place of payment. He must also provide either a cheque in favour of the bank for the amount of the draft or an authority to debit his account with that amount" (*Sheldon and Fidler's ibid* p 244). A banker who has negligently issued a bankers draft without authority signed in accordance with the company's mandate is liable for the loss; frequent repetition of the same irregular procedure is no defence *(Bank of Montreal v. Dominion Gresham Guarantee & Casualty Co.).*

In the present case, PW1 was the 'compulsory signatory'. The mandate to the defendant was "to honour all cheques, bills of exchange, promissory notes etc., signed solely by PW1 together with any one of the following two directors: Ahmad bin Kechik, Ooi Thean Chuan". There was no mandate to honour cheques, bills of exchange, promissory notes etc., not signed by PW1 together with any one of those named directors. It was contended that by the letter AB2, the mandate was changed. But that letter, even though written on TE's letterhead, was no more than just a letter – a letter from a single director albeit with instructions to issue a draft. But up and until the issuance of the draft, the only persons authorised to draw on the account were PW1 together with any one of two directors. And those persons authorised by resolution to draw on the account could only be changed by resolution (*Bank of Montreal v. Dominion Gresham Guarantee & Casualty Co.* at 665). Indeed, it was by resolution (AB16-17) and no other direction that the former signatories of the account were changed to PW1 together with any one of two directors. It was by resolution that the defendant acted, on the changes to the signatories of the account from the previous signatories to PW1 together with any one of two directors, and on the loans and charge of the land. According to AB2, with regard to the mode of drawdown of the overdraft, the arrangement was, "the defendant to honour all cheques drawn on account No 1666 when accompanied by the relevant invoices and delivery orders in support of TE's purchases". The persons authorised to speak and act for TE, with regard to

the operation of the account, were PW1 together with any one of two directors. Yet the mode of drawndown was changed, without the all important authority of the persons authorised to speak and act for TE. Quite clearly, there was failure, and on the part of the defendant, to abide by the mandate prescribed in AB16-17.

There is evidence that suggest that the defendant, probably, was negligent. DW1 testified that on the file relating to the account was the following note.

> Signature verified by Cik Noriza. Party rang up quite a few times to enquire if drawdowns in order. Please confirm. KGB please prepare demand draft favouring Benquen (M) Sdn. Bhd. and debit party's account for RM199,000.00, Chan Kok Keng 29.9.82.

Mr Sithambaram asked DW1 whether he (DW1) would agree "that the instructions on that note were wrong". Perhaps Mr Sithambaram could have probed on the particular note "Signature verified by Cik Noriza". Now whether signatures were indeed verified or not by Cik Noriza was not established; DW1 did not testify to that fact asserted in the note. DW1 merely testified that there was such a note. But if indeed the defendant had checked the signature on AB2 and compared it with the specimen signatures, the defendant ought to have discovered that AB2 came not from the persons authorised to speak and act for TE. If not, the defendant was negligent. Needless to say, the defendant was negligent if it had not verified signatures at all. Either way, it would appear that the defendant was negligent. Pertinently, there is no evidence that suggest that the defendant was not not negligent. At any rate, there was a breach of the mandate that resulted in a further drawdown of the account, an account that the plaintiff, though only a third party chargor, was liable as principal debtor (see P1 cl. 38). That being the case, was no duty owed then by the defendant to the plaintiff, to ensure that all drawdowns were at least authorised?

Edgar Joseph Jr. FCJ, in *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra Malaysia Berhad & 3 Ors* [1997] 3 CLJ 274, listed some of the rights of a chargor. None are relevant to this case. There is however a duty of care to a third party chargor that is pertinent to the instant argument that the defendant owed no duty of care to this third party chargor.

In *Bank Bumiputra Malaysia Berhad v. Galian Saham Sdn. Bhd.* [1990] 1 CLJ 58 – an action by the chargee against the borrower, third party chargor and guarantors – the third party chargor argued that the chargee owed to it a duty of care, to sell the land before expiry of the mining lease (action was filed after expiry of the lease). The case of *Standard Chartered Bank v. Johnny Walker* [1982] 1 WLR 1410 was cited in support of that argument. And Peh Swee Chin J (as he then was) held:

> In *Standard Chartered Bank*, it was held that the receiver appointed pursuant to a debenture signed in favour of the bank, in realizing assets, had owed a duty of care to the guarantors in that case to obtain the best possible price and to choose the time to sell the assets in the circumstances permitted, and that the bank there would be attached with the receiver's action if the bank had interfered with the conduct of receivership. Lord Denning in that case made an *obiter dictum* that a duty of care would also be owed by a mortgagee to a mortgagor to obtain, in the circumstances, the best possible price and exercise reasonable degree of care in choosing the time, not to sell at the worst possible time.
>
> By analogy, the *obiter dictum* of Lord Denning to a mortgagee, in my view, should also apply equally to a chargee who ought to owe a similar duty of care in selling by public auction the charged land.
>
> However, in the instant case, the parties were not concerned with the sale of the mining lease in an auction ordered in the foreclosure proceedings, and no question about the best possible price arose. Here the chargee had sued the chargor on a 'personal' covenant to pay. The time to sell, from the dictum of Lord Denning should mean the time in foreclosure proceedings after the court has granted an order for sale by public auction. The *Standard Chartered Bank* case was not strictly applicable to the instant case.

Having held that the duty of care owed to a mortgagee is also owed to a chargee, the learned judge went on to say:

> ... in view of the principle of neighbour-in-law of Lord Atkin of the *Donoghue v. Stevenson* fame, following the reasoning of Lord Denning in *Standard Chartered Bank*, in my view, the duty of care of a chargee towards a chargor would be to make it, as far as possible, for the chargor to repay as little as possible, or to have as much as possible any surplus after sale of charged land. Then, the next question to me was whether the plaintiff as chargee had been guilty of any breach of such duty of care.

On the facts of the case however, the learned judge held that the chargee had not breached that duty of care. The chargor appealed, but its appeal was dismissed by the former Supreme Court (see Editorial Note).

In *Standard Chartered Bank v. Konwah Enterprise Sdn Bhd & Ors* [1989] 2 CLJ 488, it was also held that there is a duty of care on the part of the chargee.

So it is not true that the duty of the defendant was solely within the four corners of the charge. There was a general duty of care. In the present case, there was a duty of care to ensure that all drawdowns were authorised and done in a regular fashion. Any drawdown would affect the security. If TE

defaulted, the plaintiff's security could be foreclosed. To avoid foreclosure, the plaintiff might have to pick up the tab. The plaintiff picking up the tab! Surely then, to be fair, the defendant owed it to the plaintiff to exercise reasonable care with the security.

What more, the circumstances surrounding the creation of the charge specifically imposed on the defendant a duty of care. Prior to the creation of the charge, by letter AB1 signed by two persons, presumably TE's directors and the then signatories of the account, TE notified the defendant that "so long as the charge on the land exists, no amendment to the operation of the account No 1666 shall be made without the written consent from PW1 of the plaintiff company". The reason for that notification should have been obvious to the defendant – the security would be furnished by a third party who probably wanted some control over the loan, to ensure that the loan would not be misused and so the risk of default by the borrower would be minimised. The defendant was forewarned to be forearmed. The defendant "acknowledged receipt" of that AB1. The resolution that followed again stipulated that PW1 shall be the sole 'compulsory signatory'. By then, the defendant knew or should know, that "so long as the charge on the land exists, no amendment to the operation of account No 1666 shall be made without the written consent from PW1 or the plaintiff company". To the plaintiff, it must reasonably appear, that the term "so long as the charge exists" had been accepted without reservation, or else AB1 should and or would have been rejected by the defendant prior to the creation of the charge. That it was not rejected but rather that the security was accepted only conveyed the message that the term "so long as the charge exists" was indeed accepted by the defendant. That could not have been lost to the defendant. Granted, the defendant had no control of the mandates. That, the defendant ought to have realised. The defendant should have rejected the security if it could not ensure that the term "so long as the charge exists" would be adhered to. But having accepted the security nonetheless, the defendant could not be sitting back with arms folded. AB2 affected the security and liability of its chargor. But just doing what it could, the defendant could have scrutinised AB2 and not blindly accepted AB2 as a fresh mandate, which it was not.

Most definitely, the liability of the draft was incurred because of a lapse or breach of duty. The chargor suffered a loss as a direct consequence of a lapse or breach of duty owed by the chargee to the chargor. The argument that the plaintiff had no *locus standi* has no merits whatsoever; to accept that argument would be to accept the unacceptable. The defendant must make good that loss; and that would be RM362,952.56 (being RM199,000 plus interest thereon amounting to RM169,952.56) together with interest. The plaintiff claimed for pre-judgment interest at the rate of 14% p.a. from 14 July 1986 to 1 January

1990 and at the rate 8% p.a. from 2 January 1990 to date of judgment, and, post-judgment interest at the rate of 8% p.a. Mr Quah submitted that interest should be at the rate of 8% p.a.

Pre-judgment interest is awardable pursuant to statute. Section 11 of the Civil Law Act 1956 which is in *pari materia* with s. 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) specifically provides:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or part of the debt or damages for the whole of part of the period between the date when the cause of action arose and the date of the judgment.

Nothing in that section, however, (i) shall authorise the giving of interest upon interest, (ii) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise, or (iii) shall affect the damages recoverable for the dishonour of a bill of exchange (see provisos to s. 11; see also *Public Bank Berhad v. Abdullah bin Ismail; Perwira Habib Bank (M) Berhad v. Nawi bin Muhamad; Southern Bank Berhad v. Halidah bt Ab Rahman* [1987] 1 CLJ 65).

The power conferred under s. 11 is discretionary. Even the rate of interest is not regulated. According to *Paget's Law of Banking* 11th edn at 186, the practice is as follows:

> The rate of interest is in the court's discretion. In recent years there has been a welcome trend in commercial cases to award interest at a commercial rate. The court looks not at the profit which the defendant has wrongly made out of the money withheld, but at the costs to the plaintiff of being deprived of the money which he would have had (*Tate and Lyle Food Distribution Ltd v. Greater London Council* [1981] 3 All ER 716, 722). In giving effect to the principle of *restitutio in integrum*, the court is guided in deciding the appropriate rate of interest by the rate at which plaintiffs with the general attributes of the actual plaintiff could borrow at the relevant time. The rate is usually fixed by reference to base rate or LIBOR from time to time. A commonly awarded rate is base rate plus one per cent, and it has rightly been observed that there is much to be said for a practice, but not as a rule, which is uniform and well known.

Halsbury's Law of Malaysia Vol 1 at para 10.9-024 outlined the following practice:

> As to the rate of interest it has been said that there is no such thing as a correct or proper rate or ordinary rate of interest. The award should be realistic, and there is no distinction between the interest awarded on a limitation fund in an Admiralty action and that awarded on damages for personal injuries. On the other hand, the realistic rate of interest which should be awarded in commercial cases is that at which plaintiffs in general could borrow money at the relevant time, and the court should not follow the analogy of the rate of interest awarded in personal injury cases. The court should disregard the fact that a particular plaintiff, because of his personal situation, could only borrow money at a rate of interest, or conversely, at favourable rates, but should look at the rate at which plaintiffs in general could borrow money. Where the plaintiff has suffered a foreseeable special loss, including the liability for interest charges as a consequence of the non-payment of money under a contract, he is entitled to recover the interest and charges resulting from the defendant's breach (*Wandworth v. Lydall* [1981] 2 All ER 401, approved in *President of India v. La Pintada Cia Navigacion SA* [1984] 2 All ER 773).

Under s. 11, it would appear that the court can award only simple interest (*Paget's* 11th edn p 186).

According to 'A matter of interest' [1986] 2 MLJ cixxiii at cixxvi, no guideline has yet been laid down as to the exercise of that discretion. The learned author of that article, submitted however:

> that although the successful plaintiff is *prima facie* entitled to pre-judgment interest, factors such as the nature of the claim, the reason for delay, the conduct of the parties, and the reasonableness of the defences put up are all relevant in determining the extent of interest to be awarded.

Post-judgment interest is awardable under O. 42 r. 12 of the Rules of the High Court 1980 (made under s. 16(i) of the Court of Judicature Act 1964) which reads:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

And how should the interest pay out for the plaintiff, bearing in mind that "the general object underlying the rules for the assessment of damages is, so far as possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract"? (*Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors* [1980] 1 All ER 928, 938). PW1 testified that he borrowed from Raayat 1st Merchant Bank of Kuala Lumpur, at 18.7% interest p.a., to settle the full redemption sum. The plaintiff

demanded from the defendant for a full refund of RM362,952.56 (see AB13), a sum the plaintiff would not to pay if the defendant had not defaulted in its duty of care. The plaintiff would not have to pay any interest on the said RM362,952.56 borrowed from 14 July 1986 till sale of the land in 1990. At the material time, the interest charged by the defendant was 14.75% for the authorised overdraft limit of RM1,000.000, and 16.5% for all amounts in excess thereof (see AB13). This means, that the interest claimed (14%), for the period 14 July 1986 to 1 January 1990, being on the down side, is not unrealistic. As for the period 2 January 1990 to date of judgment, the said RM362,952.56 was money the plaintiff would have enjoyed, and there are no factors to reduce the rate claimed (8%). As for the post-judgment interest, it shall be at 8% per annum.

Accordingly, and in finding for the above reasons that the defendant had wrongly debited the account with the sum of RM199,000 and so must bear that loss, the defendant is hereby ordered to pay to the plaintiff, (i) the sum of RM362,952.56 together with simple interest thereon at the rate of 14% p.a. from 14 July 1986 to 1 January 1990 and at the rate of 8% p.a. from 2 January 1990 to date of judgment and to date of satisfaction, and, (ii) the costs of this action.